

DEPARTMENT OF DEFENSE
STATEMENT OF REGULATORY PRIORITIES

Background

The Department of Defense (DoD) is the largest Federal department, employing over 1.6 million military personnel and 750,000 civilians with operations all over the world. DoD's enduring mission is to provide combat-credible military forces needed to deter war and protect the security of our nation. In support of this mission, DoD adheres to a strategy where a more lethal force, strong alliances and partnerships, American technological innovation, and a culture of performance will generate a decisive and sustained United States military advantage. Because of this expansive and diversified mission and reach, DoD regulations can address a broad range of matters and have an impact on varied members of the public, as well as other federal agencies.

Pursuant to Executive Order 12866, "Regulatory Planning and Review" (September 30, 1993) and Executive Order 13563, "Improving Regulation and Regulatory Review" (January 18, 2011), the DoD Regulatory Plan and Agenda provide notice about the DoD's regulatory and deregulatory actions within the Executive Branch.

Retrospective Review of Existing Regulations

Pursuant to section 6 of Executive Order 13563 "Improving Regulation and Regulatory Review" (January 18, 2011), the Department continues to review existing regulations with a goal to eliminate outdated, unnecessary, or ineffective regulations; account for the currency and legitimacy of each of the Department's regulations; and ultimately reduce regulatory burden and costs.

DoD Priority Regulatory Actions

The regulatory and deregulatory actions identified in this Regulatory Plan embody the core of DoD's regulatory priorities for Fiscal Year (FY) 2022 and help support President Biden's regulatory priorities and the Secretary of Defense's top priorities, along with those of the National Defense Strategy, to defend the Nation. The DoD prioritization is focused on initiatives that:

- Promote the country's economic resilience, including addressing COVID-related issues.
- Support underserved communities and improve small business opportunities.

- Promote diversity, equity, inclusion, and accessibility in the Federal workforce.
- Support national security efforts, especially safeguarding Federal Government information and information technology systems.
- Support the climate change emergency; and
- Promote Access to Voting.

Rules that Promote the Country's Economic Resilience

Pandemic

Pursuant to Executive Order 13987, "Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response to Combat COVID-19 and to Provide United States Leadership on Global Health and Security," January 20, 2021; Executive Order 13995, "Ensuring an Equitable Pandemic Response and Recovery," January 21, 2021; Executive Order 13997, "Improving and Expanding Access to Care and Treatments for COVID-19," January 21, 2021; and Executive Order 13999, "Protecting Worker Health and Safety," January 21, 2021, the Department has temporarily modified its TRICARE regulation so TRICARE beneficiaries have access to the most up-to-date care required for the diagnosis and treatment of COVID-19. TRICARE continues to reimburse like Medicare, to the extent practicable, as required by statute. The Department is researching the impacts of making some of those modifications permanent and may pursue such future action.

These modifications include:

- TRICARE Coverages and Payment for Certain Services in Response to the COVID-19

Pandemic. RIN 0720-AB81

DoD is finalizing an interim final rule that temporarily amended 32 CFR part 199 to revise: (1) 32 CFR part 199.4 to remove the restriction on audio-only telemedicine services; (2) 32 CFR part 199.6 to authorize reimbursement for interstate practice by TRICARE-authorized providers when such authority is consistent with State and Federal licensing requirements; and (3) 32 CFR part 199.17 to eliminate copayments for telemedicine services. These changes reduce the spread of COVID-19 among TRICARE beneficiaries by incentivizing use of telemedicine services, and aid providers in caring for TRICARE beneficiaries by temporarily waiving some licensure requirements. The final rule adopts this interim final rule as final with changes.

- TRICARE Coverage of Certain Medical Benefits in Response to the COVID-19 Pandemic.

RIN 0720-AB82

DoD is finalizing an interim final rule that temporarily amended 32 CFR part 199 to revise certain elements of the TRICARE program under 32 CFR part 199 to: (1) waive the three-day prior hospital qualifying stay requirement for coverage of skilled nursing facility care; (2) add coverage for treatment use of investigational drugs under expanded access authorized by the United States (U.S.) Food and Drug Administration (FDA) when for the treatment of coronavirus disease 2019 (COVID-19); (3) waive certain provisions for acute care hospitals that permitted authorization of temporary hospital facilities and freestanding ambulatory surgical centers providing inpatient and outpatient hospital services; and, consistent with similar changes under the Centers for Medicaid and Medicare Services; (4) revise diagnosis related group (DRG) reimbursement by temporarily reimbursing DRGs at a 20 percent higher rate for COVID-19 patients; and (5) waive certain requirements for long term care hospitals. The final action permanently adopts Medicare's New Technology Add-On Payments adjustment to DRGs for new medical services and technologies and adopted Medicare's Hospital Value Based Purchasing Program. The final rule adopts the interim final rule with changes, except for the note to section 199.4(g)(15)(i)(A), published at 85 FR 54923, September 3, 2020, which remains interim.

- TRICARE Coverage of National Institute of Allergy and Infectious Disease – Coronavirus

Disease 2019 Clinical Trials. RIN 0720-AB83

This interim final rule temporarily amended section 199.4(e)(26) of 32 CFR 199 to revise certain elements of the TRICARE program to add coverage for National Institute of Allergy and Infectious Disease-sponsored clinical trials for the treatment or prevention of coronavirus disease 2019 (COVID-19). Title 10, U.S.C. section 1079(a)(12) authorizes, pursuant to an agreement with the Secretary of Health and Human Services (HHS) and under such regulations as the Secretary of Defense may prescribe, a waiver of the requirement that covered care be medically or psychologically necessary in connection with clinical trials sponsored by the NIH, provided the Secretary of Defense determines that such a waiver will promote access by covered beneficiaries to promising new treatments and contribute to the development of such treatments. On September 19, 2020, the DoD entered into an agreement with NIH to permit coverage of such trials. Based on an agreement with the National Cancer Institute (NCI) and 32 CFR

199.4(e)(26), TRICARE currently covers NCI sponsored clinical trials related to cancer prevention, screening, and early detection. The intent of these statutory and regulatory provisions is to expand TRICARE beneficiary access to new treatments and to contribute to the development of such treatments. This rule, pursuant to the agreement with the NIH, temporarily amends the TRICARE regulation to authorize coverage of cost-sharing for medical care and testing of TRICARE-eligible patients who participate in Phase I, II, III, or IV clinical trials examining the treatment or prevention of COVID-19 that are sponsored by NIAID, enforcing the provisions within the agreement between DoD and NIH. Additionally, this change establishes requirements for TRICARE cost-sharing care related to NIAID-sponsored COVID-19 clinical trials; these new requirements mirror the existing requirements set forth in 32 CFR 199.4(e)(26)(ii)(B) for coverage of cancer clinical trials. This amendment supports statutory intent by encouraging participation of TRICARE beneficiaries in clinical trials studying the prevention or treatment of COVID-19 and contributing to the development of treatments, including vaccines, for COVID-19.

- Expanding TRICARE Access to Care in Response to the COVID-19 Pandemic. RIN 0720-AB85

This interim final rule will temporarily amend the TRICARE regulation at 32 CFR part 199 by: (1) adding freestanding End Stage Renal Disease facilities as a category of TRICARE-authorized institutional provider and modifying the reimbursement for such facilities; (2) adding coronavirus 2019 (COVID-19) Immunizers who are not otherwise an eligible TRICARE-authorized provider as providers eligible for reimbursement for COVID-19 vaccines and vaccine administration; (3) and adopting Medicare New COVID-19 Treatments Add-on Payments (NTCAPs).

Maximizing the Use of American-Made Goods (DFARS Case 2019-D045). RIN: 0750-AK85

This rule supports Executive Order 14005, "Ensuring the Future is Made in All of America by All of America's Workers," January 25, 2021, that builds upon a previous Executive Order 13881, Maximizing Use of American-Made Goods, Products, and Materials," July 15, 2019. The rule implements Executive Order 13881 which requires an amendment to the FAR to provide that materials shall be considered of foreign origin if: (a) for iron and steel end products, the cost of foreign iron and steel used in such iron and steel end products constitutes 5 percent or more of the cost of all the products used in such iron and steel end products; or (b) for all other end products, the cost of the foreign products used in such

end products constitutes 45 percent or more of the cost of all the products used in such end products.

The FAR changes were accomplished under FAR Case 2019-016, published in the **Federal Register** at 86 FR 6180.

In addition, the Executive Order 13881 provides that in determining price reasonableness, the evaluation factors of 20 percent (for other than small businesses), or 30 percent (for small businesses) shall be applied to offers of materials of foreign origin. The DFARS currently applies a 50 percent factor and requires no additional revisions. This DFARS rule makes conforming changes as a result of implementation of the Executive Order in the FAR.

Rules that Support Underserved Communities and Improve Small Business Opportunities

Executive Order 13985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” January 20, 2021

Rules of particular Interest to Small Business

Small Business Innovation Research Program Data Rights (DFARS Case 2019-D043). RIN 0750-AK84

This rule implements changes made by the Small Business Administration (SBA) related to data rights in the Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program Policy Directive, published in the **Federal Register** on April 2, 2019 (84 FR 12794). The SBIR and STTR programs fund a diverse portfolio of startups and small businesses across technology areas and markets to stimulate technological innovation, meet Federal research and development (R&D) needs, and increase commercialization to transition R&D into impact. The final SBA Policy Directive includes several revisions to clarify data rights, which require corresponding revisions to the DFARS. These changes include harmonizing definitions, lengthening the SBIR/STTR protection period from 5 years to 20 years, and providing for the granting of Government-purpose rights license in place of an unlimited rights license upon expiration of the SBIR/STTR protection period.

Reauthorization and Improvement of Mentor-Protégé Program (DFARS Case 2020-D009). RIN 0750-AK96)

This rule implements section 872 of the National Defense Authorization Act for Fiscal Year 2020. Section 872 reauthorizes and modifies the DoD Mentor-Protégé Program. The purpose of the Program is to provide incentives for DoD contractors to assist eligible small businesses (protégés) in enhancing their

capabilities and to increase participation of such firms in Government and commercial contracts. Under this program, protégés expand their footprint in the defense industrial base by partnering with larger companies (mentors). As a result of this rule, the date by which new mentor-protégé agreements may be submitted and approved is extended to September 30, 2024. In addition, mentors incurring costs prior to September 30, 2026, may be eligible for certain credits and reimbursements. Per the statute, this rule also establishes additional performance goals and outcome-based metrics to measure progress in meeting those goals.

Rules that Promote Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce

Nondiscrimination on the Basis of Disability in Program or Activities Assisted or Conducted by the DoD and in Equal Access to Information and Communication Technology Used by DoD, and Procedures for Resolving Complaints. RIN: 0790-AJ04

Revisions to this regulation: (1) update and clarify the obligations that Section 504 of the Rehabilitation Act of 1973 (section 504) imposes on recipients of Federal financial assistance and the Military Departments and Components (DoD Components); (2) reflect the most current Federal statutes and regulations, as well as developments in Supreme Court jurisprudence, regarding unlawful discrimination on the basis of disability and promotes consistency with comparable provisions implementing title II of the Americans with Disabilities Act (ADA); (3) implement section 508 of the Rehabilitation Act of 1973 (section 508), requiring DoD make its electronic and information technology accessible to individuals with disabilities; (4) establish and clarify obligations under the Architectural Barriers Act of 1968 (ABA), which requires that DoD make facilities accessible to individuals with disabilities; and (5) Provide complaint resolution and enforcement procedures pursuant to section 504 and the complaint resolution and enforcement procedures pursuant to section 508. These revisions are particularly relevant in light of Executive Order 14035, "Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.

Rules that Support National Security Efforts

Department of Defense (DoD)-Defense Industrial Base (DIB) Cybersecurity (CS) Activities. RIN: 0790-AK86

This rule will amend the DoD-Defense Industrial Base (DIB) Cybersecurity (CS) activities regulation. It will allow a broader community of defense contractors access to relevant cyber threat information that is

critical in defending unclassified networks and information systems and protecting DoD warfighting capabilities. These amendments seek to address the increasing cyber threat targeting all defense contractors including those in the vulnerable supply chain by expanding eligibility to defense contractors that process, store, develop, or transmit DoD Controlled Unclassified Information (CUI). These steps align with the Administration's efforts to provide defense contractors with critical and real-time cybersecurity resources needed to safeguard DoD CUI.

Rules that Support the Climate Change Emergency

Policy and Procedures for Processing Requests to Alter US Army Corps of Engineers Civil Works

Projects Pursuant to 33 U.S.C. 408. RIN: 0710-AB22

Where a party other than the USACE seeks to use or alter a Civil Works project that USACE constructed, the proposed use or alteration is subject to the prior approval of the USACE. Some examples of such alterations include an improvement to the project; relocation of part of the project; or installing utilities or other non-project features. This requirement was established in section 14 of the Rivers and Harbors Act of 1899 and is codified at 33 USC 408 (section 408). Section 408 provides that the USACE may grant permission for another party to alter a Civil Works project, upon a determination that the alteration proposed will not be injurious to the public interest and will not impair the usefulness of the Civil Works project. The USACE is proposing to convert its policy that governs the section 408 program to a binding regulation. This policy, Engineer Circular 1165-2-220, Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408, was issued in September 2018.

Credit Assistance for Water Resources Infrastructure Projects. RIN: 0710-AB31

The USACE proposes to implement a new credit program for dam safety work at non-Federal dams. The program is authorized under the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA) and Division D, Title 1 of the Consolidated Appropriations Act of 2021. WIFIA authorizes the USACE to provide secured (direct) loans and loan guarantees (Federal Credit instruments) to eligible water resources infrastructure projects and to charge fees to recover all or a portion of the USACE' cost of providing credit assistance and the costs of conducting engineering reviews and retaining expert firms, including financial and legal services, to assist in the underwriting and servicing of Federal credit

instruments. Projects would be evaluated and selected by the Secretary of the Army (the Secretary), based on the requirements and the criteria described in this rule .

Flood Control Cost-Sharing Requirements Under the Ability to Pay Provision. RIN: 0710-AB34

Section 103(m) of the Water Resources Development Act (WRDA) of 1986, as amended (33 U.S.C. 2213(m)), authorizes the USACE to reduce the non-Federal share of the cost of a study or project for certain communities that are not able financially to afford the standard cost-share. Part 241 of title 33 in the Code of Federal Regulations provides the criteria that the USACE uses in making these determinations where the primary purpose of the study or project is flood damage reduction. The proposed rule would update this regulation, including by broadening the project purposes for which the USACE could reduce the non-Federal cost-share on this basis.

Revised Definition of “Waters of the United States” –Rule 1 RIN: 0710-AB40

In April 2020, the EPA, and the Department of the Army (“the agencies”) published the Navigable Waters Protection Rule (NWPR) that revised the previously codified definition of “waters of the United States” (85 FR 22250, April 21, 2020). The agencies are now initiating this new rulemaking process that restores the regulations (51 FR 41206) in place prior to the 2015 “Clean Water Rule: Definition of ‘Waters of the United States’” (80 FR 37054, June 29, 2015), updated to be consistent with relevant Supreme Court decisions. The agencies intend to consider further revisions in a second rule in light of additional stakeholder engagement and implementation considerations, scientific developments, and environmental justice values. This effort will also be informed by the experience of implementing the pre-2015 rule, the 2015 Clean Water Rule, and the 2020 Navigable Waters Protection Rule.

Revised Definition of “Waters of the United States” –Rule 2 RIN: 0710-AB47

The Department of the Army and the Environmental Protection Agency intend to pursue a second rule defining “Waters of the United States” to consider further revisions to the agencies' first rule (RIN 0710-AB40) which proposes to restore the regulations in place prior to the 2015 “Clean Water Rule: Definition of ‘Waters of the United States’” (80 FR 37054, June 29, 2015), updated to be consistent with relevant Supreme Court Decisions. This second rule proposes to include revisions reflecting on additional stakeholder engagement and implementation considerations, scientific developments, and environmental justice values. This effort will also be informed by the experience of implementing the pre-2015 rule,

the 2015 Clean Water Rule, and the 2020 Navigable Waters Protection Rule.

Rules Promoting Access to Voting

Federal Voting Assistant Program (FVAP). RIN 0790-AK90

DOD is finalizing an interim final rule for its Federal Voting Assistance Program (FVAP). The FVAP assists overseas service members and other overseas citizens with exercising their voting rights by serving as a critical resource to successfully register to vote. On March 7, 2021, the White House released Executive Order 14019 on Promoting Access to Voting. The purpose of the Executive Order is to protect and promote the exercise of the right to vote, eliminate discrimination and other barriers to voting, expand access to voter registration and accurate election information, and ensure registering to vote and the act of voting be made simple and easy for all those eligible to do so. To accomplish this purpose, with this final rule DoD is doing the following:

- Maximizing voter awareness of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) eligibility and resources by providing better coordination with the Federal Government's voting assistance services to improve voter accessibility and communication.
- Requiring DoD components to establish component-wide programs to communicate and disseminate voting information, with the goal of improving communication and clarity for the impacted population.
- Requiring federal agencies to enter into memorandums of understanding (MOU) with the DoD to provide accurate, nonpartisan voting information and assistance to ensure military and overseas voters understand their voting rights, how to register and apply for an absentee ballot, and how to return their absentee ballot successfully.
- Promoting opportunities to register to vote and participate in elections to include civilians working for the Department who vote locally.
- Distributing voter information and use of vote.gov in conjunction with fvap.gov website and current communications to support a comprehensive approach to voter awareness.
- Creating innovative solutions to reduce barriers and increase voter awareness of their status in the Uniformed and Overseas Citizens Absentee Voting Act absentee voting process, including increased visibility of overseas ballots.

- Developing materials to support absentee voting by military and overseas U.S. citizens with limited English proficiency.

Federal Register Requests for Information (RFIs)

In support of Executive Orders 14017, “America’s Supply Chains,” 13985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, and 14036, Promoting Competition in the American Economy,” DoD published a RFI on September 8, 2021, titled “Notice of Request for Comments on Barriers Facing Small Businesses in Contracting with the Department of Defense.” The participation of dynamic, resilient, and innovative small businesses in the defense industrial base is critical to the United States’ efforts to maintain its technological superiority, military readiness, and warfighting advantage. In furtherance of its efforts to maximize opportunities for small businesses to contribute to national security, the DoD sought public input on the barriers that small businesses face in working with the DoD.

Additionally, in support of Executive Order 14017, “America’s Supply Chains,” DoD published an RFI on September 28, 2021, titled “Federal Register Notice of Request for Written Comments in Support of the Department of Defense’s One-Year Response to Executive Order 14017, “America’s Supply Chains.” The Executive Order directs six Federal agencies to conduct a review of their respective industrial bases, with the objective to use this assessment to secure and strengthen America’s supply chains. One of these directives is for the Secretary of Defense, in consultation with the heads of appropriate agencies, to submit a report on supply chains for the defense industrial base, including key vulnerabilities and potential courses of action to strengthen the defense industrial base. The effort will build on the Executive Order report, Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States (released October 2018) and the Annual Industrial Capabilities Report, which is mandated by the Congress.